

**FAIR POLITICAL PRACTICES COMMISSION**  
**Memorandum**

**To:** Chairman Randolph, Commissioners Blair, Downey, Huguenin, and Remy

**From:** William J. Lenkeit, Counsel, Legal Division  
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**Subject:** Amendments to the Post-Employment “Permanent Ban” under Regulation 18741.1 – Definition of Supervisory Authority

**Date:** April 25, 2005

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**I. EXECUTIVE SUMMARY**

This memorandum addresses potential amendments to regulation 18741.1 relating to the permanent ban on “switching sides” under the Political Reform Act’s restrictions on post-employment activities, commonly known as the revolving door restrictions. Staff proposes amendments to this regulation to add conforming language codifying the Commission’s Opinion in *In re Lucas* (2000) 14 FPPC Ops. 15 clarifying in what matters a supervisor is deemed to have participated as a result of the proceeding being “under his or her supervisory authority.”

Regulation 18741.1(a)(4) provides that a supervisor “is deemed to have participated” in any matter that was: (1) pending before the official’s agency, and (2) under his or her supervisory authority. The regulation does not define what is considered a proceeding “under a supervisor’s ‘supervisory authority.’”

The proposed regulatory amendment would define proceedings under a supervisor’s “supervisory authority” as those in which the supervisor has direct supervision over the employees involved in the proceeding or has any contact with any of the parties regarding the subject of the proceeding.

**II. ISSUE AND BACKGROUND**

The Political Reform Act (“the Act”)<sup>1</sup> prohibits former state governmental officials, under certain conditions, from attempting to influence proceedings in which the official participated while serving in his or her capacity as a state governmental official. (Sections 87401 and 87402; regulation 18741.1.) This restriction is a “permanent ban” prohibiting a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California if the

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

proceeding is one in which the former state employee *participated* while employed by the state.

This regulatory project relates to the circumstances under which an official has “participated” in a proceeding while employed by the state and specifically, the language in regulation 18741.1, subdivision (a)(4) which states that a supervisor “is deemed to have participated” in any matter that was “under his or her supervisory authority.” In 1999, the Commission adopted regulation 18741.1, interpreting sections 87401 and 87402. Subdivision (a)(4) of that regulation provides that the restrictions of the permanent ban apply when the official has participated “personally and substantially by making, participating in the making, or influencing of a governmental decision.” It further provides that a supervisor is deemed to have participated in any proceeding which was “pending before” the official’s agency and was under his or her *supervisory authority*.

In 2000, the Commission issued its opinion in *In re Lucas* (2000) 14 FPPC Ops. 15. As further discussed below, this opinion established certain operational guidelines in determining what matters are considered to be under the “supervisory authority” of a given supervisor. This regulatory project is intended as a conforming change to codify the terms of the *Lucas* opinion.

### III. STATUTES & AFFECTED REGULATION

Sections 87401 and 87402 provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

“(a) The State of California is a party or has a direct and substantial interest.

“(b) The proceeding is one in which the former state administrative official participated.”

(Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding

in which the official would be prohibited from appearing under Section 87401.”

(Section 87402.)

Regulation 18741.1 clarifies the statute as follows:

“(a) The prohibitions of Government Code Sections 87401 and 87402 apply to any state administrative official if all of the following criteria are met:

“(1) The official has permanently left state service or is on a leave of absence.

“(2) The official is compensated, or promised compensation, for making an appearance or communication, or for aiding, advising, counseling, consulting, or assisting in representing another person, other than the State of California, in a judicial, quasi-judicial or other proceeding. However, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services are not prohibited or limited by this section.

“(3) The official makes an appearance or communication before any officer or employee of any state administrative agency for the purpose of influencing, as defined in 2 Cal. Code Regs. Section 18746.2, a judicial, quasi-judicial or other proceeding, including but not limited to any proceeding described in 2 Cal. Code Regs. Section 18202, subdivisions (a)(1) - (a)(7).

“(4) The judicial, quasi-judicial or other proceeding includes any proceeding in which the official participated personally and substantially by making, participating in the making, or influencing of a governmental decision, as defined in 2 Cal. Code Regs. Sections 18702.1 - 18702.4, but excluding any proceeding involving the rendering of a legal advisory opinion not involving a specific party or parties. Any supervisor is deemed to have participated in any proceeding which was ‘pending before,’ as defined in 2 Cal. Code Regs. Section 18438.2, subdivision (b), the official’s agency and which was under his or her *supervisory authority*.

“(5) The judicial, quasi-judicial or other proceeding is the same proceeding in which the official participated.” (Emphasis added.)

#### IV. ADVICE LETTERS AND COMMISSION OPINION

For purposes of applying the permanent ban, it is essential to determine in which proceedings the official “participated,” within the meaning of the statute. Section 87400(d) provides:

“‘Participated’ means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.” (Section 87400(d).)

This covers any proceeding in which the official personally participated. In the *Brown* Advice Letter, No. A-91-033, the Commission further clarified the scope of this definition. In *Brown*, the Commission considered a request from a former chief of its Enforcement Division, concerning applicability of the permanent ban to his post-retirement representation in an enforcement case that commenced in the waning weeks of his state service. The Commission rejected his argument that he was not personally and substantially involved in that proceeding since no substantive work was undertaken either by him or the enforcement staff in the matter during his tenure. The Commission concluded that former supervisors in state administrative agencies are deemed to have participated personally and substantially in proceedings which were initiated or pending, and were under the former official’s supervisory authority during the official’s prior state employment.

The *Brown* advice was premised on the Commission’s finding that it was within the normal job duties of the Enforcement Division chief to directly oversee any one of the enforcement matters pending in that division by means of the type of activities described in section 87400(d). It was not considered material to the applicability of the ban that he chose not to exercise any of those activities in the proceeding prior to separating from state service. The advice in *Brown* noted that since 1985, the Commission’s staff had consistently advised that a former state administrative agency official is deemed to have personally and substantially participated in all proceedings of his former agency, if those proceedings were in his or her *chain of command* during the official’s tenure at the agency. (*Sanford* Advice Letter, No. A-85-182.)

Thereafter, regulation 18741.1 was adopted. When deliberating upon the then-proposed regulation, subdivision (a)(4) was characterized as a codification of the *Sanford* and *Brown* advice letters, with the exception that the regulation was not meant to address situations where an officials’ acts are merely ministerial. (Recorded Commission Meeting, 1/7/99.)

Subsequently, in the Commission’s opinion in *In re Lucas, supra*, the Commission determined that not all proceedings subordinate to an official within his or her *chain of command* are considered “under his or her supervisory authority” as

provided in regulation 18741.1 (a)(4). In so doing, it specifically rejected the chain-of-command theory.

In *Lucas*, the former state official had been the deputy director of the Sales and Use Tax Department for the State Board of Equalization. The “proceeding” involved audits performed by this department during his tenure. In this position, the official reported only to the executive director (the chief administrative officer of the agency). The subordinate supervisory chain-of-command included: Chief of field operations, district administrator, district principal tax auditor, and tax audit supervisor.

In its finding of facts, the Commission in *Lucas* established the following:

“An audit may conclude at the Audit Supervisor or District Principal Auditor level, but sometimes the District Administrator is involved. [The official] was not routinely contacted by these administrators regarding the audits, and never received an audit status report listing individual audits in progress. [He] only received a quarterly report from the BOE that listed the gross amount of audit production figures.

“[The official] had no direct role [footnote omitted], supervisory or otherwise, in this audit process. Although the broad job responsibilities of the Deputy Director do include administrative oversight of the audit program, the position did not involve reviewing any specific individual audit or audit decision, or otherwise supervising the audits. [The official] did render advice, guidance and/or policy that applied generally to all employees of the department, including BOE auditors, or to all taxpayers or all members of a specific class of taxpayers throughout the state.”

While the *Lucas* Opinion seems to focus its finding on the degree of involvement necessary to meet the statutory definition of “participated,” in that it be “personal and substantial” (see *Lucas* Opinion, p. 8), the clear holding in *Lucas* is intended to distinguish how far “supervisory authority,” as provided in regulation 18741.1 (a)(4), extends over a given matter. However, “supervisory authority” is not a phrase defined under the Act. Codification of that holding is what is intended by this regulatory project and, in so doing, clarifying the meaning of the term “supervisory authority.”

*Lucas* states, with respect to this language, that “[a]lthough the broad job responsibilities of the Deputy Director do include administrative oversight of the audit program, the position did not involve reviewing specific individual audits or audit decisions, or otherwise supervising the audits. In fact, those responsibilities were expressly delegated to others in the agency’s structure.” (*Lucas*, *supra*, p. 8.)

In this respect, *Lucas* places certain limits on the extent of what constitutes a proceeding under which a supervisor has “supervisory authority” in determining the

supervisor's deemed involvement in the proceeding as a high level official. It is clear from *Lucas* that the Commission did not intend that the reach of the phrase "supervisory authority" extend all the way up the chain-of-command to the agency's top officers if they otherwise have no actual involvement or control of the action.

After an extensive discussion of the facts and the officials' job responsibilities as a deputy director at the State Board of Equalization, the Commission concluded that despite the fact field audits were conducted by staff within the deputy director's chain-of-command, the position of deputy director did not have a role, either indirect or direct, supervisory or otherwise, in reviewing specific individual audits or audit decisions, or otherwise supervising the audits; those supervisory responsibilities were expressly delegated to others in the agency's structure. For this reason, the Commission concluded that these field audits were not proceedings made by individuals under the deputy director's supervisory authority. In so doing, the Commission distinguished the facts in *Lucas* from those in the *Brown* advice letter, in that *Brown* involved an official with "direct supervisory control over all enforcement matters within the agency," (*Lucas, supra*), while finding that "[the Deputy Director's] general administrative responsibilities [were] insufficient to rise to the level of 'personal and substantial' involvement [as] required by statute."<sup>2</sup>

## V. REGULATORY AMENDMENTS

As noted above, regulation 18741.1(a)(4) provides that a supervisor "is deemed to have participated" in any matter that was: (1) pending before the official's agency, and (2) under his or her supervisory authority. The regulation does not define what is considered "a proceeding under the supervisor's supervisory authority."

The proposed regulatory amendment would define "proceedings under the supervisor's supervisory authority" as those in which the supervisor:

"(a) Has direct supervision over the person performing the investigation, review, or other determination made in the proceeding and includes assigning the matter for which the required conduct is taken; or

"(b) Reviews, discusses, or authorizes any action in the proceeding; or

"(c) Has any contact with any of the participants in the proceeding regarding the subject of the proceeding."

The proposed regulation language will codify the terms in the *Lucas* opinion, clarifying that "supervisory authority" does not include general oversight of the

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<sup>2</sup> The *Lucas* opinion further stated, "We caution that nothing in this opinion should be taken to mean that general job classification trumps actual experience. Where, as exemplified in [the Deputy Director's] participation in audits before the Board, there is actual participation by an official in a given matter, that official is permanently disqualified from future participation after leaving state service."

administrative actions or functions of a program where the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency's structure unless the supervising official has actual involvement in the proceeding

## **VI. STAFF RECOMMENDATION**

All these amendments are consistent with *In re Lucas* and staff proposes noticing the amendments for adoption at the July 2005 Commission Meeting.

Attachment: Proposed regulation 18741.1